SUPREME COURT OF THE UNITED STATES

PARKING ASSOCIATION OF GEORGIA, INC. ET AL.
v. CITY OF ATLANTA, GEORGIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 94–1532. Decided May 30, 1995

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE O'CONNOR joins, dissenting.

Motivated by a desire to improve the attractiveness of its downtown region, the Atlanta City Council passed an ordinance requiring certain existing surface parking lots to include landscaped areas equal to at least 10% of the paved area and to have at least one tree for every eight parking spaces. The ordinance covers some 350 parking lots; petitioners estimate that compliance with the landscaping requirements will cost approximately $12,500 per lot, for a total of $4,375,000. Additionally, parking lot owners will lose revenue due to lost parking spaces and lost advertising dollars: the trees allegedly will obscure existing advertising signs and cause petitioners to lose contracts worth about $1,636,000.

Petitioners sought injunctive and declaratory relief on the ground that the Atlanta ordinance was an uncompensated taking of property in violation of the Fifth Amendment. The state trial court ruled in favor of the city. In a divided opinion, the Supreme Court of Georgia affirmed. 264 Ga. 764, 450 S. E. 2d 200 (1994). The Court held that the ordinance was neither a physical nor a regulatory taking. The Court relied on *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980), to conclude that the ordinance was constitutional because it "advances legitimate governmental interests and

leaves the plaintiffs with an economically viable use in their property." The court distinguished *Dolan* v. *City of Tigard*, 512 U. S. ___ (1994), which requires a showing of rough proportionality between the conditions imposed and the impact of the owner's development, on the ground that although the city of Tigard had not made an "'individualized determination that the required dedication is related both in nature and extent to the impact of the development,'" 264 Ga., at 766, n. 3, 450 S. E. 2d, at 203, n. 3 (quoting *Tigard*, 512 U. S., at ___ (slip op., at 16)), the city of Atlanta had made a "legislative determination" with regard to many landowners, 264 Ga., at 766, n. 3, 450 S. E. 2d, at 203, n. 3, thus placing this case outside the reach of *Tigard*.

The lower courts are in conflict over whether *Tigard*'s test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature. In addition to the court below, at least one other court has relied upon the "legislative" character of state action to conclude that *Tigard* was inapposite and that the less stringent *Agins* standard should be applied. See *Harris* v. *City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994). Other courts, however, have applied *Tigard* to cases involving alleged legislative regulatory takings. In *Trimen Development Co.* v. *King Cty.*, 124 Wash. 2d 261, 877 P. 2d 187 (Wash. 1994), the Washington Supreme Court applied *Tigard* to an ordinance similar to the one at issue here. A King County Council ordinance required that developers seeking to build housing either dedicate land for public parks or pay a fee. Despite the fact that the ordinance was clearly a "legislative enactment," the Court applied *Tigard*'s rough proprotionality test. *Id.*, at 274, 877 P. 2d, at 194. See also *Manocherian* v. *Lennox Hill Hospital*, 84 N. Y. 2d 385, 393, 643 N. E. 2d 479, 483 (1994), cert. denied, ___ U. S. ___ (1995) (applying *Tigard* to alleged legislative taking).

It is hardly surprising that some courts have applied *Tigard*'s rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Although *Dolan* purports to be an exception to *Agins*, the logic of these two cases appears to point in different directions. The lower courts should not have to struggle to make sense of this tension in our case law. In the past, the confused nature of some of our takings case law and the fact-specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict. *See Tigard*, 512 U. S., at ___ (slip op., at 8) (observing that certiorari was granted because the Oregon Supreme Court allegedly had misapplied *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987)). Where, as here, there is a conflict, the reasons for granting certiorari are all the more compelling.

Because the petition poses a substantial federal question concerning regulatory takings and because there is confusion in the lower courts, I would grant certiorari.